

COVID-19 : Potential Legal Actions Against China

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INTRODUCTION: FACTS AND FIGURES

Pursuant to public information, the first world COVID-19 case would be a man from Wuhan who developed symptoms in mid-November 2019, even though the exact date is disputed. The unknown virus spread rapidly, and the number of infected individuals increased, pushing countries in Asia, Europe, the Middle East and North America to react and impose strict measures, such as a lockdown. The World Health Organization (WHO) declared a pandemic on March 11th, 2020.

As of 2 June 2020, over 6,2 million people have been infected, and over 376 thousand people have died of the virus across the world.¹

Several political figures have questioned the Chinese government's handling of the health crisis, arguing they have been too slow to inform the public and the international community, and too slow to impose sanitary measures.

The chronology of events shows that the Wuhan Municipal Health Commission informed the city, and the Chinese Health Authorities informed the World Health Organization China Country Office of several cases of respiratory failures for unknown causes, on December 31, 2019, more than 2 weeks after Zhang Jixian, a doctor from the Hubei Provincial Hospital of integrated Chinese and Western Medicine, had alerted the authorities about the new form of Coronavirus.

The WHO struggled to get needed information from China during critical early days of the coronavirus pandemic; recordings of WHO internal meetings show officials complaining in meetings during the week of 6 January that Beijing was not sharing data needed to evaluate the risk of the virus to the rest of the world; it was not until 20 January that China confirmed coronavirus was contagious and 30 January that the WHO declared a global emergency.²

Thus, the communication of information from China during the months following the apparition of the virus is controversial. It is alleged that China withheld important information regarding the virus, including inaccurate reports of medical staff with regard to human-to-

¹ <https://www.santepubliquefrance.fr/maladies-et-traumatismes/maladies-et-infections-respiratoires/infection-a-coronavirus/articles/infection-au-nouveau-coronavirus-sars-cov-2-covid-19-france-et-monde#block-242818>.

² Theguardian.com, "China withheld data on coronavirus from WHO, recordings reveal", 2 June 2020, <https://www.theguardian.com/world/2020/jun/02/china-withheld-data-coronavirus-world-health-organization-recordings-reveal>.

human transmission,³ and crucial reports on the number of “silent carriers”, ie people who are infected by the coronavirus but show delayed or no symptoms.⁴

Indeed, multiple reports have suggested Chinese doctors and health professionals who were speaking about the outbreak of virus in health facilities were silenced, threatened or arrested.⁵

Such a worldwide crisis has led several actors to question whether China should be held accountable for the pandemic and/or of its disastrous consequences on the human, social and economic levels.

The purpose of this paper is to identify the legal actions which have or could be led against China in order to render this State accountable for the damages caused by the virus. Several proceedings have already been initiated by individuals or NGOs against the Chinese authorities at the domestic or international level (I) The possibility of an action by a State against China before an international jurisdiction remains open (II). Even if such an international court were to issue a decision against China, its implementation would be uncertain (III).

I. LEGAL PROCEEDINGS ALREADY INITIATED AGAINST CHINA

Individuals or NGOs have launched several actions against China at the national (1.1) and international level (1.2).

1.1.Domestic legal actions

In March 2020, lawyer and former federal prosecutor Larry Klayman submitted a class action complaint against the Chinese government in the **United States (“US”) District Court for the Northern District of Texas**, alleging “*massive damage caused by defendants as a result of COVID-19 release from an illegal and internationally outlawed bioweapons facility in the city of Wuhan of the People’s Republic of China.*” Klayman maintained that COVID-19 was “*designed by China to be a biological weapon of war*” and that China had violated “*U.S. law, international laws, treaties and norms*”, whether or not it intended to release it.⁶

³ World Health Organization on Twitter, “*Preliminary investigations conducted by the Chinese authorities have found no clear evidence of human-to-human transmission of the novel coronavirus (2019-nCoV) identified in Wuhan, China*”, 14 January 2020, <https://twitter.com/WHO/status/1217043229427761152>

⁴ South China Morning Post, “*A third of coronavirus cases may be ‘silent carriers’, classified Chinese data suggests*”, 22 March 2020 <https://www.scmp.com/news/china/society/article/3076323/third-coronavirus-cases-may-be-silent-carriers-classified>

⁵ BBC.com, “*The Chinese doctor who tried to warn others about coronavirus*”, 6 February 2020, <https://www.bbc.com/news/world-asia-china-51364382>

See also BusinessInsider.fr, “*At least 5 people in China have disappeared, gotten arrested, or been silenced after speaking out about the coronavirus — here’s what we know about them*”, 20 February 2020, <https://www.businessinsider.fr/us/china-coronavirus-whistleblowers-speak-out-vanish-2020-2>

See also TheGuardian.com, “*Coronavirus: Wuhan doctor speaks out against authorities*”, 11 March 2020, <https://www.theguardian.com/world/2020/mar/11/coronavirus-wuhan-doctor-ai-fen-speaks-out-against-authorities>

⁶ LawandCrime.com, “*Larry Klayman Files \$20 Trillion Dollar Lawsuit Against China for ‘Creation and Release’ of COVID-19*”, 19 March 2020, <https://lawandcrime.com/lawsuit/larry-klayman-files-20-trillion-dollar-lawsuit-against-china-for-creation-and-release-of-covid-19/>

See also Post-Gazette.com, “*Missouri sues China in federal court, alleging responsibility for pandemic*”, 22 April 2020, <https://www.post-gazette.com/news/world/2020/04/21/Missouri-sues-China-coronavirus-pandemic-state-files-lawsuit/stories/202004210169>

A class action was filed in **US District Court for the Southern District of Florida** the same month, by residents of Miami-Dade County and Palm Beach County, and The Pitching Lab LLC; they sued China for having “covered [...] up” the eventual coronavirus COVID-19 pandemic for its “*own economic self-interest*”, alleging negligence, negligent infliction of emotional distress, intentional infliction of emotional distress, strict liability for conducting ultrahazardous activity, and public nuisance.⁷

In April 2020, Missouri Attorney General Eric Schmitt filed a lawsuit against the Chinese government in the **US District Court of Missouri**, seeking “*billions of dollars*” in damages for the medical and economic toll of the coronavirus, alleging that China had misled the world about how easily the virus could spread, silenced doctors who tried to sound the alarm, failed to respond adequately to the threat and then hoarded crucial medical supplies.⁸

However, these lawsuits have very little chance to succeed. In the United States, the 1976 Foreign Sovereign Immunities Act (FSIA) provides foreign governments with **state immunity**, that shields them from lawsuits in federal and local courts in the US, except in relation to certain actions relating to commercial activity in the US. The implication of state immunity is that sovereign governments are immune against lawsuits in foreign courts. This means that the Chinese government cannot be sued in a US court.

In April 2020, a Republican Senator and a Republican Congressman proposed a bill to change the Foreign Sovereign Immunities Act (FSIA) in order to authorize suits against China over COVID-19.⁹ If this bill passes, it might open the gates to lawsuits against China for the damages caused by the pandemic. However, it seems unlikely considering the courts would be flooded by individual lawsuits and would have little to no means to hold the Chinese government accountable.

1.2. International legal actions

International legal proceedings have also been initiated against the Chinese government.

In March and April 2020, three reports (“*signalements*”) were filed before the **International Criminal Court** (“ICC”), two against China’s government and one against Brazil’s President, alleging crimes against humanity and asking the Court to open an investigation.¹⁰

The first report was submitted by US lawyer Larry Klayman, who argued the Chinese government could be liable for crimes against humanity, on the ground that the virus would

⁷ LawandCrime.com, “China Sued for ‘Covering Up’ Coronavirus Pandemic in Its ‘Own Economic Self-Interest’”, 16 March 2020, <https://lawandcrime.com/lawsuit/china-sued-for-covering-up-coronavirus-pandemic-in-its-own-economic-self-interest/>

⁸ The Wall Street Journal (WSJ.com), “Lawsuits Target China for Coronavirus Damage”, 22 April 2020, <https://www.wsj.com/articles/lawsuits-target-china-for-coronavirus-damage-11587585212>

⁹ WashingtonPost.com, “Leading Republicans want to send China the bill for coronavirus pandemic’s costs”, 24 April 2020, <https://www.washingtonpost.com/business/2020/04/24/republican-coronavirus-china-xi/>

¹⁰ Marianne.net, “‘Arme biologique’ et ‘mise en danger’: la Cour pénale internationale examine deux signalements liés au Covid-19”, 15 April 2020, <https://www.marianne.net/monde/arme-biologique-et-mise-en-danger-la-cour-penale-internationale-examine-deux-signalements-lies>

have been created in a laboratory in Wuhan as a “*bioweapon*” and released without proper caution.¹¹

Another report was filed against the Chinese authorities by a Mumbai-based lawyer, Ashish Sohani, accusing Beijing of failing to contain the coronavirus COVID-19 pandemic and allowing the deadly virus to spread across the globe.¹²

A third report was filed by a Legal Association in Brazil, ABJD, against the country’s President, Jair Bolsonaro, for crimes against humanity, alleging that he endangered the Brazilian people by ending prematurely the containment and minimizing the pandemic.

Pursuant to article 7 of ICC Statute, crime against humanity means certain acts “*when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack*”; Article 30 adds that “*unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.*”

In light of these criteria, the qualification of crime of humanity appears doubtful, especially with regard to the mental element, and it is not likely that any of the reports mentioned above would lead to the opening of an investigation by the ICC Prosecutor.

A complaint has also been filed against China by the International Council of Jurists and the Indian Bar Association in front of the **United Nations Human Rights Council** (“UNHRC”), asking the organization to inquire and direct China to “*adequately compensate the international community ... for surreptitiously developing a biological weapon ... and also for serious ... harm caused to these States due to the inaction and negligence to respect the international obligations.*”¹³ However the UNHRC has no sanction power, it can only render reports and recommendations.

The Chinese government as well as the Wuhan laboratory have denied all these accusations.¹⁴

In light of the disastrous consequences of the global pandemic, some States may consider taking legal action against China for how it handled the crisis.

¹¹ Complaint before the ICC “*in the matter of crimes against humanity and genocide by development of outlawed biological warfare weapons by the People’s Republic of China*”, <https://www.freedomwatchusa.org/pdf/200330-complaint%20before%20the%20international%20criminal%20court%20.pdf>

¹² Zeenews.India.com, “*Mumbai man moves International Criminal Court against China over coronavirus COVID-19 pandemic*”, April 19, 2020 <https://zeenews.india.com/india/mumbai-man-moves-international-criminal-court-against-china-over-coronavirus-covid-19-pandemic-2277464.html>

¹³ TimesofIndia.com, “*ICJ Moves UNHCR against China for Reparations*”, 3 April 2020, <https://timesofindia.indiatimes.com/india/icj-moves-unhcr-against-china-for-covid-19-reparations/articleshow/74965784.cms>; <https://www.businesstoday.in/current/economy-politics/icj-aiba-move-unhcr-against-china-over-coronavirus-outbreak/story/400139.html>

¹⁴ The Guardian.com, “*China denies cover-up as Wuhan coronavirus deaths revised up 50%*”, 17 April 2020, <https://www.theguardian.com/world/2020/apr/17/china-denies-cover-up-as-wuhan-coronavirus-deaths-revised-up-50>

See also BrusselsTimes.com, “*Coronavirus: Chinese laboratory denies accusations*”, 19 April 2020, <https://www.brusselstimes.com/all-news/107090/coronavirus-chinese-laboratory-denies-accusations/>

II. POTENTIAL INTERNATIONAL LEGAL ACTIONS FROM STATES AGAINST CHINA

Any action from a State against China would necessitate identifying both the proper forum (2.1.) and the international norms which would have been violated by China (2.2.).

2.1. Which forum for an international legal action against China?

A State could contemplate filing a lawsuit against China before the International Court of Justice (ICJ¹⁵) (2.1.1) or the Permanent Court of Arbitration (“PCA”) (2.2.2), for having endangered the world population and hurt the world’s economy by its poor management of the COVID-19 pandemic, on the basis of a breach of its international obligations.

In this regard, several actors have thus alleged that China would have failed to inform the World Health Organization (“WHO”), a United Nations special agency, in a timely manner against the dangers of the virus and its transmission mode, in violation of the WHO Constitution or of the WHO International Health Regulations, which refer, respectively, to the ICJ or the PCA’s jurisdiction.

2.1.1. *The International Court of Justice*

The ICJ is an organ of the United Nations, which has contentious and advisory jurisdiction: it can settle legal disputes between States submitted to it by them (contentious cases) and issue advisory opinions on legal questions referred to it by United Nations organs and specialized agencies (advisory proceedings).

In order for the ICJ to rule on a dispute involving China, it must have jurisdiction, whether by a provision in a treaty or by a declaration of the States in question, and there must be a legal basis for the action, ie an alleged violation of a provision of a treaty.

There are several possibilities for a State to refer a case to the ICJ. The conditions are the result of the will of States to contribute to international public law while keeping their sovereign immunity.

Only States (States Members of the United Nations¹⁵ and other States which have become parties to the Statute of the Court¹⁶ or which have accepted its jurisdiction under certain conditions) may be parties to contentious cases.

The Court is competent to entertain a dispute only if the States concerned have accepted its jurisdiction in one or more of the following ways:

- through the reciprocal effect of **declarations** made by them under the Statute, whereby each has accepted the jurisdiction of the Court as compulsory in the event of a dispute with another State having made a similar declaration.¹⁷ These declarations must be deposited with the United Nations Secretary-General and may contain reservations excluding certain categories of dispute.

¹⁵ Article 93 §1 of the Charter of the United Nations provides that “*all Members of the United Nations are ipso facto parties to the Statute*”.

¹⁶ Article 35 §1 of the ICJ Statute.

¹⁷ Article 36 §2 to §5 of the ICJ Statute.

China has not made such a declaration so far and it is not probable that it would issue such a statement in the near future, giving its binding effect.

- by entering into a **special agreement** to submit the dispute to the Court.

It is not likely that China, which has never been a party to a dispute before the ICJ and contests any wrongdoings in its management of the COVID-19 pandemic, would agree to ratify such a special agreement to solve a dispute with a State related to this issue.

- by virtue of a **jurisdictional clause**, for instance when they are parties to a treaty containing a provision whereby, in the event of a dispute of a given type or disagreement over the interpretation or application of the treaty, one of them may refer the dispute to the Court.¹⁸

This last option would be the most secure way for a State to ensure China's appearance before the ICJ, without China being able to object to the jurisdiction of the Court.

China has ratified several treaties which contain such a provision, such as the Treaty of friendship, commerce and navigation of 4 November 1946 with the United States (Art. XXVIII), the Economic co-operation agreement of 3 July 1948 with the United States (Art. X), or the Treaty of amity of 18 April 1947 with Philippines (Art. 2).

It has also ratified the Constitution of the World Health Organization, whose article 75 expressly confers jurisdiction to the ICJ in the event of a dispute not resolved in front of the World Health Assembly. The article states that *“Any question or dispute concerning the interpretation or application of this Constitution which is not settled by negotiation or by the Health Assembly shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement”*.

Thus, these treaties would confer jurisdiction to the ICJ to settle a dispute with China if the requiring State could demonstrate a breach of a provision of these treaties.

It should be noted that if a dispute arises concerning the jurisdiction of the ICJ, the matter is decided by the ICJ itself.¹⁹

2.1.2. The Permanent Court of Arbitration

The PCA, established by treaty in 1899, is an intergovernmental organization providing services for the resolution of disputes involving various combinations of states, state entities, intergovernmental organizations, and private parties. The PCA's functions are not limited to arbitration and also include providing support in other forms of peaceful resolution of international disputes, including mediation, conciliation, and other forms of alternative dispute resolution.

¹⁸ See for instance *“Certain Iranian Asset”* case: in 2019 Iran brought a case against the United States before the ICJ; the Court declared it had jurisdiction on the basis of the alleged violation of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the two countries, which selects the ICJ as the forum for the resolution of disputes arising in the context of the treaty.

¹⁹ Article 36 §6 of the ICJ Statute.

The cases dealt with by the PCA span a range of legal issues involving territorial and maritime boundaries, sovereignty, human rights, international investment, and international and regional trade.

Like for the ICJ, the PCA is competent to entertain a dispute only if the States concerned have accepted its jurisdiction.

With regard to health issues, China, which is one of the 122 member States of the PCA, is bound by the WHO International Health Regulations adopted on 23 May 2005, which impose several obligations upon WHO member States in case of events that may constitute a public health emergency of international concern. These Regulations stipulate, in their article 56 §3, that any dispute between States regarding their application or interpretation may be settled through arbitration under the auspices of the PCA:

“A State Party may at any time declare in writing to the Director-General that it accepts arbitration as compulsory with regard to all disputes concerning the interpretation or application of these Regulations to which it is a party or with regard to a specific dispute in relation to any other State Party accepting the same obligation. The arbitration shall be conducted in accordance with the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States²⁰ applicable at the time a request for arbitration is made. The States Parties that have agreed to accept arbitration as compulsory shall accept the arbitral award as binding and final. The Director-General shall inform the Health Assembly regarding such action as appropriate.

Nevertheless, the same article, in its §4, specifies that *“Nothing in these Regulations shall impair the rights of States Parties under any international agreement to which they may be parties to resort to the dispute settlement mechanisms of other intergovernmental organizations or established under any international agreement.”*

Thus, a State alleging a violation of the WHO 2005 International Health regulations by China in its management of the COVID-19 crisis could invite it to settle their dispute through the arbitration of the PCA, but China could refuse it.

2.2. Which breach of international law for an international legal action against China?

As noted above, to bring a case against China in front of the ICJ or the PCA, a State will have to demonstrate a violation, by China, of an international legal instrument conferring jurisdiction to these courts, unless China voluntarily agree to submit their dispute to such courts, unlikely hypothesis.

2.2.1. A violation of the Constitution of the World Health Organization

China’s responsibility over the COVID-19 crisis could be invoked on the basis of several articles of the WHO Constitution.

²⁰ Available at <https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitrating-Disputes-between-Two-Parties-of-Which-Only-One-is-a-State-1993.pdf>. These Rules are optional and emphasize flexibility and party autonomy; for instance, the choice of arbitrators is not limited to persons who are listed as Members of the Permanent Court of Arbitration.

The introductory principles of the Constitution state that: “[...] Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures. Accepting these principles, and for the purpose of co-operation among themselves and with others to promote and protect the health of all peoples, the Contracting Parties agree to the present Constitution and hereby establish the World Health Organization as a specialized agency within the terms of Article 57 of the Charter of the United Nations.”

In addition, article 1 of the Constitution states that “the objective of the World Health Organization shall be the attainment by all peoples of the highest possible level of health”.

Article 20 states that the Members States tacitly accept the conventions or agreements adopted by the Health Assembly. According to article 21, the Health Assembly is the authority competent to adopt regulations concerning “sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease; nomenclatures with respect to diseases, causes of death and public health practices; standards with respect to diagnostic procedures for international use [...]”.

In addition, articles 61 to 65 list the obligations by States to provide reports to the WHO on the sanitary and health situation on their territory. For example, article 63 states that “Each Member shall communicate promptly to the Organization important laws, regulations, official reports and statistics pertaining to health which have been published in the State concerned.” Article 64 further requires that “Each Member shall provide statistical and epidemiological reports in a manner to be determined by the Health Assembly”.

Thus, a State may consider relying on these provisions of the WHO Constitution to allege that China failed to comply with its reporting obligations to the Organization by delaying and/or limiting the information disclosed about the COVID-19 virus and its transmission mode. Since, as noted above, article 75 of the WHO Constitution confers jurisdiction to the ICJ, such a dispute could be submitted to the ICJ.

It should be noted that article 21 and 64 of the Constitution explicitly or implicitly refer to the International Health Regulations adopted by the Health Assembly, which could also be relied upon to allege a breach, by China, of its international obligations.

2.2.2. A violation of the International Health Regulations

As mentioned earlier, China is bound by the WHO International Health Regulations adopted on 23 May 2005. The purpose of these Regulations is “to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade” (article 2). Such Regulations are directly relevant to determine whether China managed properly the COVID-19 crisis.

Article 3 of the Regulations stipulates that their implementation shall be guided by the Charter of the United Nations and the WHO Constitution, as well as by the goal of their universal application for the protection of all people of the world from the international spread of disease.

Article 6 of the Regulations focuses on the required celerity in notifying information to the WHO related to events which may constitute a public health emergency of international concern, such as the COVID-19:

“1. Each State Party shall assess events occurring within its territory by using the decision instrument in Annex 2. Each State Party shall notify WHO, by the most efficient means of communication available, by way of the National IHR Focal Point, and within 24 hours of assessment of public health information, of all events which may constitute a public health emergency of international concern within its territory in accordance with the decision instrument, as well as any health measure implemented in response to those events. If the notification received by WHO involves the competency of the International Atomic Energy Agency (IAEA), WHO shall immediately notify the IAEA. 2. Following a notification, a State Party shall continue to communicate to WHO timely, accurate and sufficiently detailed public health information available to it on the notified event, where possible including case definitions, laboratory results, source and type of the risk, number of cases and deaths, conditions affecting the spread of the disease and the health measures employed; and report, when necessary, the difficulties faced and support needed in responding to the potential public health emergency of international concern.”

Even if the State does not have specific information on the situation, it should keep the WHO informed as thoroughly as possible during unexpected or unusual public health events (article 7) and consult the WHO regarding possible sanitary measures (article 8).

In addition, article 42 stresses that *“health measures taken pursuant to these Regulations shall be initiated and completed without delay, and applied in a transparent and non-discriminatory manner”*. Article 44 recalls that *“States Parties shall undertake to collaborate with each other, to the extent possible, in: (a) the detection and assessment of, and response to, events as provided under these Regulations (...)”*.

Thus, a State may consider relying on these provisions of the WHO International Health Regulations to allege a violation of China’s obligations towards the WHO and its Member States, by its belated reaction to the apparition and propagation of the COVID-19 virus. As mentioned above, since article 56 §3 of the Regulations stipulate that any dispute between States regarding their application or interpretation can be settled through arbitration under the auspices of the PCA, a State could submit such a dispute to the PCA, but only with the agreement of China. A dispute alleging a violation of the International Health Regulations could also be submitted to the ICJ with a special agreement of China.

2.2.3. A breach of other international instruments

Two other treaties ratified by China could be considered as a potential basis for a claim against China in front of the ICJ, since they include a jurisdictional clause for this court.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora prohibits the trade of endangered species, among which is the pangolin since 2013.²¹ A State would have to prove that the origin of the COVID-19 was caused by the trade of wild animals

²¹ Conference of the Parties of the Convention on International Trade of Endangered Species of Wild Fauna and Flora, *Decisions 16.41 And 16.42 On Pangolins (Manis spp.)*, Cop16, Bangkok, March 2013

on open markets in China to submit a case against China before the ICJ; this has not been demonstrated yet pursuant to available public information.

In addition, the 1946 Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of China,²² in its article VI, provides that on the territory of each contracting party, the nationals of the other contracting party “*shall receive the most constant protection and security for their persons and property, and shall enjoy in this respect the full protection and security required by international law*”. The United States could consider submitting a case against China before the ICJ if they could demonstrate that some Americans died of the COVID-19 in China because of the insufficient protection or security provided by the Chinese authorities.

Even if a court were to rule in disfavor of China, its adversary could face some difficulties to obtain the implementation of its judgement.

III. OBSTACLES TO THE IMPLEMENTATION OF DECISIONS AGAINST CHINA

The States may face some difficulties to obtain the implementation of a decision issued against China by an international jurisdiction in light of the lack of enforcement power of these courts, resulting from the States’ sovereign immunity (3.1.). Nevertheless, the States are not powerless between themselves and could have recourse to other mechanisms to incite China to implement a decision issued by an international court (3.2).

3.1. The lack of enforcement power of international jurisdictions

3.1.1. The decisions of the International Court of Justice

Even if the ICJ were to issue a decision against China for a violation of its international obligations, it might be difficult to obtain the application of the measures or sanctions decided, since the ICJ does not have itself any enforcement power.

According to article 94 of the Charter of the United Nations:

- “1. *Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.*
2. *If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.*”

Thus, the application of ICJ decisions relies on the voluntary execution by the States.

In addition, there is a debate as to whether the UN Security Council could intervene if the lack of implementation of the ICJ judgement did not threaten the world peace or security. Indeed, the Security Council is “*primary responsibility for the maintenance of international peace and security*” pursuant to article 24 of the UN Charter, and its enforcement power under Chapter

²² Available at <https://www.loc.gov/law/help/us-treaties/bevans/b-cn-ust000006-0761.pdf>.

VII of this Charter²³ apply only in case of “*threats to the peace, breaches of the peace, and acts of aggression.*”

Last but not least, a judgement against one of the permanent members of the Security Council can be vetoed by one of them. Article 27 of the Charter of the United Nations gives a veto power to the five permanent members of the Security Council, including China, France, Russia, the United States, and the United Kingdom. Therefore, the Security Council could not adopt any measure against China without the Chinese authorities’ prior approval, which is unlikely. For instance, in 1986, in the *Military and Paramilitary Activities in and against Nicaragua case*, the ICJ condemned the United States to compensate Nicaragua but the United States, which considered that the ICJ had no jurisdiction in this case,²⁴ blocked the judgement at the Security Council. This prevented Nicaragua from obtaining the compensation awarded by the judgement.

Thus, a decision from the ICJ against China, if any, will probably only be symbolic. Its application could be blocked at the level of the UN Security Council, even if this last one were to consider itself competent to ensure its implementation.

3.1.2. The decisions of the Permanent Court of Arbitration

Similarly, the PCA issues binding decisions but has no enforcement power. Like for the ICJ, the implementation of its decisions relies on the voluntary execution by the States. As opposed to the ICJ, the PCA is not an organ of the United Nations, so it cannot even rely on the eventual assistance of the UN Security Council.

Thus, a State which would not recognize the PCA jurisdiction may refuse to implement its rulings. For example, in 2013 the Republic of the Philippines brought a case against the People's Republic of China concerning a territory dispute in the South China Sea. The PCA declared it had jurisdiction over the case, but China declared that it would not participate in the arbitration. On 12 July 2016, the Court ruled in favor of the Philippines, but China rejected the ruling.²⁵

3.2. The mechanisms available to the States in case of lack of implementation of an international judgement against China

In case of lack of application of a decision from an international court by China, the parties to the dispute, if willing to reach a compromise, may agree to conclude **bilateral post-judisdictional treaties**, which will 'adapt' the judgment of the international court, or to set up

²³ Pursuant to article 40 of the UN Charter, the Security Council can “*call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable.*” According to article 41, it “*may decide what measures not involving the use of armed force are to be employed to give effect to its decisions*”, such as “*complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.*” Last, article 42 provides that “*it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.*”

²⁴ See a summary of the case at <https://www.icj-cij.org/en/case/70>.

²⁵ The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China), <https://pca-cpa.org/en/cases/7/>

See also TheGuardian.com, “*Beijing rejects tribunal's ruling in South China Sea case*”, 12 July 2016, <https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china>

joint **commissions**, mechanisms for the materialization of post-jurisdictional arrangements, which aim, through negotiation, at achieving a consensual application of the judgment, even if it means making certain amendments to it. Such an approach has been adopted in cases involving territorial and maritime boundaries, following rulings from the ICJ.²⁶

In China failed to implement the judgment of an international jurisdiction, the opposing State could adopt some **countermeasures** to incite the Chinese authorities to apply it.

The concept of countermeasures first appeared in the practice of States to regulate relations with their neighbors. Their lawfulness was affirmed by the arbitral award of December 9, 1978 in the case of the *Interpretation of the Air Agreement of March 27, 1946*:

*"In the current state of general international law, apart from the specific commitments arising from specific treaties, and in particular from the mechanisms established within the framework of international organizations, each State itself assesses its situation with regard to other States. In the presence of a situation which in his opinion involves the violation of an international obligation by another State, he has the right, subject to the general rules of international law relating to armed constraints, to have his right respected by counter-measures."*²⁷

A first, procedural, limitation to the resort to countermeasures lies in the need to exhaust preliminarily amicable means of dispute settlements. A second, substantive, limitation to countermeasures is the requirement that they be proportionate to the alleged harm.

Countermeasures include interruption of economic relations or of means of communication, the severance of diplomatic relations, etc.

In China's case, the violation of its international obligation warranting countermeasures would be the non-compliance with the decision of an international court. Thus, the opposing State could decide to impose a full or limited embargo on trade with China, but this option would not be very realist for most of the States given the economic power of China. Nevertheless, on April 30th, 2020, President of the United States Donald Trump threatened to impose tariffs on trade with China in relation with the coronavirus outbreak.²⁸ Diplomatic relations with China could also be suspended.

It should be stressed that countermeasures are distinct from the public international law notion of **retaliation or retorsion measures**, which involve armed forces.²⁹ Indeed, the lawfulness of retorsion measures remains questionable since treaty law have prohibited the use of force in interstate relations, except in the case of individual or collective self-defense in reaction to an

²⁶ <https://www.unilim.fr/iirco/2016/05/04/mariame-viviane-nakoulma-lapplication-des-decisions-de-la-cour-internationale-de-justice-dans-les-affaires-de-delimitation-des-frontieres-en-afrique-partie-ii/>.

²⁷ Case of the Interpretation of the Air Agreement of March 27, 1946, Arbitral Award of December 9, 1978, (USA v. France), R.S.A., Vol. XVIII, December 22, 1978, New York, United Nations, pp. 454-493, specifically p. 483.

²⁸ TheWashingtonPost.com, "U.S. officials crafting retaliatory actions against China over coronavirus as President Trump fumes", April 30, 2020, <https://www.washingtonpost.com/business/2020/04/30/trump-china-coronavirus-retaliation/>

²⁹ Mariame Viviane Nakoulma, « L'application des décisions de la Cour internationale de justice dans les affaires de délimitation des frontières en Afrique – Deuxième partie : L'application des décisions de la Cour internationale de justice relativement aux aspects procéduraux », Université de Limoges, IIRCO, <https://www.unilim.fr/iirco/2016/05/04/mariame-viviane-nakoulma-lapplication-des-decisions-de-la-cour-internationale-de-justice-dans-les-affaires-de-delimitation-des-frontieres-en-afrique-partie-ii/>

armed attack (Article 51 of the UN Charter)³⁰; in times of conflict, case law recognizes that reprisals are lawful when they respond to an attack, provided that they are proportionate to the attack and directed exclusively against combatants and military objectives, in accordance with humanitarian law.

In conclusion, it seems there are many obstacles to a successful lawsuit against China in front of domestic or international jurisdictions, to make it accountable for the pandemic and/or its consequences: the questionable jurisdiction of a court over China, the question of the action's legal basis, and the difficult execution of a potential ruling. However, other non-binding mechanisms are possible in order to investigate the issue, such as the recourse to the World Health Assembly.

³⁰ *“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security ».*